No. 89-1405

In The

Supreme Court of the United States

October Term, 1989

EDWARD TEMENGIL, et al.

Petitioners,

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, et al.

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS, TRUST TERRITORY OF THE PACIFIC ISLANDS AND HIGH COMMISSIONER, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER the District Court for the Northern Mariana Islands had jurisdiction to award monetary damages against the Government of the Trust Territory of the Pacific Islands pursuant to 42 U.S.C. §§ 1981 and 1983 by virtue of Section 502(a)(2) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America.

II

WHETHER the Trusteeship Agreement for the Former Japanese Mandated Islands and the Equal Protection provision of the Trust Territory Code create private rights of action for monetary damages against the Trust Territory government.

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2. *Temengil, et al. v. TTPI, et al.*, 881 F.2d 647 (9th Cir. 1989).

3. *Temengil, et al. v. TTPI, et al.*, 9th Circuit Nos. 88-1548, 88-1639, 88-1675 (Order Entered Jan. 2 1990).

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on July 28, 1989, reversing in part and affirming in part the judgment of the district court entered on December 1, 1987. The Ninth Circuit's order denying Plaintiffs' Petition for Rehearing and Rehearing *en banc* was entered on January 2, 1990. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On January 16, 1981, Plaintiffs filed this wage discrimination class action in the District Court for the Northern Mariana Islands against the Trust Territory government, the High Commissioner in his/her official capacity, the United States, the United States Department of the Interior, and the Secretary of the Interior in his official capacity, seeking injunctive relief and monetary damages on behalf of themselves and others employed by the Trust Territory government within the Commonwealth of the Northern Mariana Islands from January 9, 1978. They

brought the action under 42 U.S.C. §§1981 and 1983, Titles VI (42 U.S.C. §§2000d et seq.) and VII (42 U.S.C. §§2000e et seq.) of the Civil Rights Act of 1964, the Trusteeship Agreement for the Former Japanese Mandated Islands (July 18, 1947, 61 Stat. 3302, T.I.A.S. No. 1665) ("Trusteeship Agreement"), and the equal protection provision of the Trust Territory Code (1 T.T.C. §7). They alleged the various salary schedules in effect for the Trust Territory government on and after January 9, 1978, discriminated against Trust Territory citizens on the basis of race and national origin.

The district court awarded monetary damages against the Trust Territory government under 42 U.S.C. §§1981 and 1983, the Trusteeship Agreement, and the Trust Territory Code, and granted injunctive relief against all defendants. It dismissed the claims brought under Titles VI and VII of the Civil Rights Act. On appeal the Ninth Circuit Court of Appeals reversed the award of monetary damages against the Trust Territory government and affirmed the dismissals of the Title VI and Title VII claims. Two judges on the panel held that Sections 1981 and 1983 were not extended to the Trust Territory government through Section 502(a)(2) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. 94-241, 90 Stat. 262 (1976) ("Covenant"), Pet. App. 11-14. In a concurring opinion, Judge Kozinski found that because the Trust Territory government was funded exclusively by United States Congress the action under Sections 1981 and 1983 was essentially one against the United States to which it had not consented. *Id.* at

23-5. The panel further determined that neither the Trusteeship Agreement nor the Trust Territory Code provisions relied on created a private right of action for monetary damages. *Id.* at 14-17. Plaintiffs' Petition for Rehearing and Rehearing *en banc* was denied with no Ninth Circuit judge requesting a vote to rehear the matter. *Id.* at 1-2.

The Trust Territory consisted of a group of islands which had been administered by Japan under a League of Nations Mandate before World War II and which were administered by the United States from 1947 under a United Nations strategic trusteeship which, among other things, granted to the United States "full powers of administration, legislation and jurisdiction over the territory." Art. 3, Trusteeship Agreement, subject to the United States' obligation to "promote the development of the inhabitants . . . toward self-government or independence, as may be appropriate to the particular circumstances of the trust territory and its peoples." Art. 6(1). The administrative structure of the Trust Territory evolved through a series of Orders of the Secretary of the Interior who, as of 1962, had been delegated authority over the entire Trust Territory by the President. Exec. Order No. 11021, 27 Fed. Reg. 4409 (1962); *see also* 48 U.S.C. §1681(a). In 1968, Secretarial Order No. 2918, 34 Fed. Reg. 157 (1968), consolidating prior orders, vested executive power in a High Commissioner appointed by the President with the advice and consent of the Senate, judicial power in a High Court, and legislative authority in a popularly elected Congress of Microensia.

In relatively recent years the various island groups in the Trust Territory proceeded towards self-government. The Northern Mariana Islands elected a relationship with the United States defined by the Covenant approved by Congress and the President in 1976, resulting in a pre-Covenant administrative separation of the Northern Mariana Islands from the remainder of the Trust Territory. *See* Secretarial Order 2989, 41 Fed. Reg. 15892 (1976). Neither the High Commissioner nor the Congress of Micronesia exercised executive or legislative powers in the Northern Mariana Islands after that date. In 1978 the Republic of Palau and the Republic of the Marshall Islands rejected the Constitution of the Federated States of Micronesia leaving three separate island groups in the Trust Territory and necessitating a legislative break-up in October of 1978 when the Congress of Micronesia was abolished and three separate legislatures commenced operations pending the advent of constitutional governments. *See* Secretarial Order 3027, 43 Fed. Reg. 49858 (1978). This was followed in 1979 by Secretarial Order 3039, 44 Fed. Reg. 28116 (1979), delegating most all of the remaining functions of the Trust Territory government to the constitutional governments of the Marshall Islands, Palau, and the Federated States of Micronesia (Kosrae, Yap, Ponape (now Pohnpei), and Truk (now Chuuk)), with the Trust Territory government retaining only certain fiscal administrative, accounting, budgeting and limited legislative review functions. With the approval of the Compacts of Free Association between the United States and the Federated States of Micronesia and the Republic of the Marshall Islands, *see* Compact of Free Association Act of 1985, Pub. L. 99-239, 99 Stat. 1770 (1985), and the Presidential

declaration the Trusteeship Agreement is "no longer in effect" for these jurisdictions and the Commonwealth, *see* Presidential Proclamation No. 5564, 51 Fed. Reg. 40399, 40400 (1986), only the Republic of Palau remained in the Trust Territory. In 1987, the Secretary of the Interior abolished the Office of the High Commissioner and delegated certain functions to the Assistant Secretary of the Interior for Territorial and International Affairs. *See* Secretarial Order 3119, 52 Fed. Reg. 27859-02 (1987).

ARGUMENT

The Ninth Circuit's decision does not conflict with applicable decisions of this Court or with any decision of another United States Court of Appeals on the same matter. Furthermore, with the Trusteeship Agreement terminated with respect to the Republic of the Marshall Islands, the Federated States of Micronesia, and the Commonwealth of the Northern Mariana Islands, the Office of High Commissioner having been abolished and the Trust Territory government operating with only a handful of employees under Secretarial Order 3119 in the twilight of a trusteeship encompassing only the Republic of Palau, the issues decided by the Ninth Circuit are unlikely to arise in any new context. In any event, the decision of the Ninth Circuit was correct and review is unwarranted.

Plaintiffs do not directly assert a conflict with applicable decisions of this Court or with a decision of another United States Court of Appeals on the same matter. Pet. at 15-16. They mention that the Ninth Circuit "failed to apply applicable Supreme Court Standards as to parties

subject to the rule of law in a particular jurisdiction as set forth in *Sloan Shipyards Corp. v. U.S. Shipping Board Corp.*, 258 U.S. 549 (1922)," Pet. at 15-16, and "[m]isapplied District of Columbia circuit rulings regarding law applicable within the Trust Territory as discussed in *Gale v. Andrus*, 642 F.2d 826 (D.C. Cir. 1980)." Pet. at 16. They also assert intra-circuit conflicts. Pet. at 16.

I. THE DECISION DOES NOT CONFLICT WITH THAT OF ANOTHER UNITED STATES COURT OF APPEALS

In determining that Section 502(a)(2) of the Covenant did not automatically extend federal laws to the operations of the Trust Territory government, the majority of the panel applied the recognized rule articulated in *Gale v. Andrus, supra*, 643 F.2d at 830, that "the laws of the United States do not automatically apply to the [Trust] Territory unless they are specifically made applicable by Congress." *See also People of Enewetak v. Laird*, 353 F. Supp. 811, 815 (D. Haw. 1973) ("Congress must manifest an intention to include the Trust Territory within the coverage of a given statute before courts will apply its provisions to claims arising there."). Plaintiffs, endeavoring to portray a conflict between the Ninth Circuit's decision and the decision in *Gale v. Andrus, supra*, confect a distinction between a so-called "geo-political" notion of the Trust Territory and the Trust Territory government which they mistakenly contend was manifested in *Gale*. In so doing Plaintiffs fail to take into account the fact that the court in *Gale* determined, relying on the general rule of Trust Territory statutory applicability, that the Freedom of

Information Act did not apply to the Trust Territory government. The court in *Gale* drew no distinction between "geo-political" and governmental concepts, and by refusing to interpolate the distinction urged by Plaintiffs into the general rule, the Ninth Circuit neither "misapplied" nor rendered a decision in conflict with the decision in *Gale*. Both courts determined certain federal laws did not apply to the Trust Territory government itself.

II. THE DECISION DOES NOT CONFLICT WITH ANY APPLICABLE DECISION OF THIS COURT

The Ninth Circuit's decision does not conflict with applicable decisions of this Court. Plaintiffs' reference to the general proposition in *Sloan Shipyards, supra,* 258 U.S. at 566-67, that "any person within the jurisdiction is always amenable to the law of the jurisdiction," is simply irrelevant to the issue of the application *vel non* of federal statutes to the Trust Territory government which was decided by the Ninth Circuit in this case involving what had been characterized as "a very unique trusteeship arrangement that differs widely from any of the traditional relationships of governmental entities." *Gale v. Andrus, supra,* 643 F.2d at 830. Indeed, the unconsidered application of this general statement to the Trust Territory government in the Commonwealth would have, as the panel recognized, "give[n] the commonwealth undue leverage," (Pet. App. 12), in the imposition of its laws or those federal laws it elected to receive on the operations of the Trust Territory government.

Plaintiffs' adduction of the unremarkable generality in *Sloan Shipyards,* a case which concerned the immunity

of a District of Columbia corporation established by the United States and which has been severely limited in subsequent cases, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 111 n. 21 (1984), merely begs the underlying and limited question of statutory applicability decided in this case.

III. THE DECISION DID NOT CONFLICT WITH OTHER DECISIONS OF THE NINTH CIRCUIT

Plaintiffs further suggest an intra-circuit conflict between this decision and the decisions in *People of Saipan v. Dept. of the Interior*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975), and *Flemming v. CNMI*, 837 F.2d 401 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 222 (1988). Neither of these cases addressed the issue of statutory applicability to the Trust Territory government or the availability of private rights of action for monetary damages under the Trusteeship Agreement or the Trust Territory Bill of Rights. Even if there were an intra-circuit conflict, resolution should be left to the Ninth Circuit.

IV. THE ISSUES DETERMINED ARE NOT OF CONTINUING IMPORTANCE

In light of the winding-down of the Trusteeship and the Trust Territory government, the issues determined in this case are of no continuing importance. As noted by the Ninth Circuit, this case arises in the "twilight" of the Trusteeship. On November 3, 1986, the President of the United States, acting pursuant to Section 1002 of the Covenant and Sections 101 and 102 of the Compact of Free Association Act of 1985, Pub. L. 99-239, 99 Stat. 1770,

1773 (1985), declared "that the Trusteeship Agreement for the Pacific Islands is no longer in effect as of October 21, 1986, with respect to the Republic of the Marshall Islands, as of November 3, 1986, with respect to the Federated States of Micronesia, and as of November 3, 1986, with respect to the Northern Mariana Islands." Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986). The Republic of Palau remained under Secretarial Order 3039, 44 Fed. Reg. 28,116 (1979), until July 10, 1987, at which time the Secretary of the Interior issued Secretarial Order 3119, 52 Fed. Reg. 27859-02 (1987), abolishing the Office of the High Commissioner and delegating the Secretary's authority with respect to the Trust Territory to the Assistant Secretary of Territorial and International Affairs who was also to assume and exercise the authority of the Office of the High Commissioner. Secretarial Order 3119, §3. As the Ninth Circuit noted, only a vestigial Trust Territory government remains with a handful of employees and a unified compensation plan. (Pet. App. 11 n. 5) It is clear the limited issues fully considered and decided by the Ninth Circuit in this case are unlikely to arise again in any new context.

V. SECTIONS 1981 AND 1983 OF TITLE 42 WERE NOT EXTENDED TO THE WORKINGS OF THE TRUST TERRITORY GOVERNMENT BY SECTION 502 OF THE COVENANT

The Court was correct in finding no indication of Congressional intent, manifest or otherwise, for a comprehensive application of federal laws to the Trust

Territory government by virtue of Section 502(a)(2) of the Covenant. Such is especially clear when it is realized that at the time the Covenant was adopted " 'it was not possible for the MPSC [Marianas Political Status Commission] and the United States delegation to review each federal law to determine whether and how it should apply,' " Pet. App. 112-13 (district court quoting MPSC Analysis of the Covenant at page 8, *reprinted in* Senate Interior and Insular Affairs Committee Hearing on S.J. Res. 107 at 406), and the jurisdiction and responsibilities and duties of the Trust Territory government extended exclusively outside the Northern Mariana Islands to the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands, areas not generally subject to United States laws. *See e.g. United States v. Covington*, 783 F.2d 1052, 1055 (9th Cir. 1985) (Marshall Islands are "undeniably a foreign country" for purposes of evaluating a confession obtained there), *cert. denied*, 479 U.S. 831 (1986).

The *holus bolus, see Gale v. Andrus, supra*, 642 F.2d at 815, application of an indeterminate number and quality of federal laws to the operations of the Trust Territory government could have subjected the Trust Territory government to conflicting laws and inconsistent responsibilities since it performed its functions exclusively with respect to the remainder of the trust territory rapidly progressing towards independence. Furthermore, without specific Congressional consideration of each one of these laws to determine whether they were consistent with the obligations of the United States to the remainder of the Trust Territory and with the performance of the Trust Territory government's duties and obligations in

furtherance of the United States' obligations, the wholesale application of federal laws to Trust Territory government operations merely because the High Commissioner remained in the Commonwealth would not have been consistent with Article 3 of the Trusteeship Agreement. Finally, it is undisputed that the Trust Territory government was entirely funded by the United States congressional appropriations for the trust territory, *see* Pet. App. 23-4, with the bulk of the funds being distributed by the High Commissioner to the respective governments of the remainder of the Trust Territory for governmental operations, programs, services and projects. *See* Secretarial Order 3039, § 3.a.1. The sudden imposition on the Trust Territory government of federal statutes authorizing monetary damages which would be satisfied from these limited funds without expressly immunizing them from judgment would be contrary to and in derogation of the United States Trusteeship Agreement obligations.

Plaintiffs proffer three legislative history excerpts in support of their position. None of the excerpts are relevant. The excerpt from the Senate Report merely restates Section 502 of the Covenant, S. Rep. No. 94-433, 94th Cong., 1st Sess. at 77 (1975) (quoted at page 23 of the Petition), while the extract from the Marianas Political Status Commission Analysis of the covenant, *reprinted in*/ Senate Interior and Insular Affairs Committee Hearing on S.J. Res. 107 at 374 (quoted at page 23 of the Petition), describes how government in the Commonwealth will change under the Covenant and has no relevance to the governmental structure for the remainder of the Trust Territory. Finally, the statement of Representative Burton

regarding ambiguities in the Covenant, Pet. at 22, and inserted in the Congressional Record a week after the House passed the joint resolution approving the Covenant,[1] was made with respect to statutes otherwise applicable to the Northern Marianas (e.g. if federal assistance is available under two or more covenant sections or laws, the more favorable provision would apply, 122 Cong. Rec. at 7272) and did not imply that the scope of the Covenant could be expanded to affect the remainder of the Trust Territory or its government. With the absence of any express or implied mention of the Trust Territory government in Section 502(a)(2) and the anomalous situation which would otherwise arise, there is simply no "ambiguity" to which Rep. Burton's statement could apply. The Covenant neither addresses the issue of the application of federal laws to the operations of the Trust Territory government nor alters the rule of the policy applied by the Ninth Circuit in this case.

An alternative ground supporting the judgment is the immunity of the Trust Territory government. In his concurring opinion, Judge Kozinski concluded under the general principle of *Dugan v. Rank*, 372 U.S. 609, 620 (1963), that the " ' "essential nature and effect of the proceeding" ' . . . is a suit against the United States," Pet. App. 24, and that there has been no waiver of sovereign immunity with respect to the claims asserted in this case. Pet. App. 24-5. This follows from the fact that the

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[1] The statement was published in the Congressional Record on March 18, 1976, one week after the House concluded its debate on the Covenant, 122 Cong. Rec. 6149 (Mar. 11, 1976), and more than three weeks after Senate passage. 122 Cong. Rec. 4232 (Feb. 24, 1976).

Trust Territory government's funding consists entirely of United States appropriations, Pet. App. 23-4, and "any judgment against the Trust Territory would ultimately 'expend itself on the public treasure.' *Land v. Dollar*, 330 U.S. [731,] 738 [1947]." Pet. App. 23. Because the monies received, held, administered and dispersed by the High Commissioner were Congressionally appropriated or obligated grant funds, *see e.g. 36th Annual Report of Administering Authority to the United Nations*, 38-39 (1983); 48 U.S.C. 1964e (authorization for appropriations), and they directly and exclusively funded the High Commissioner's operations under Secretarial Order 3039, were applied to designated capital improvement projects in the Trust Territory, or were granted to the constitutional governments of the Trust Territory for operations and the providing of basic governmental services, all in the discharging of United States' obligations and responsibilities as the administering authority under the Trusteeship Agreement, claims against these funds, i.e. monetary claims against the Trust Territory government, are barred by the sovereign immunity of the United States.

VI. NEITHER THE TRUSTEESHIP AGREEMENT NOR THE TRUST TERRITORY BILL OF RIGHTS CREATED A RIGHT TO MONETARY DAMAGES

The panel also correctly determined that neither the Trusteeship Agreement nor the Trust Territory Bill of Rights equal protection component created a right to monetary damages. Pet. App. 17. Interpreting the Trusteeship Agreement as a treaty which creates judicially enforceable rights "only if the signing parties so desire." *Cardenas v. Smith*, 733 F.2d 909, 918 (D.C. Cir. 1984), the

Ninth Circuit correctly found no indication "that Congress or the Executive intended the Trusteeship Agreement to create a right to monetary damages." Pet. App. 16.

The Trusteeship Agreement contains no provision authorizing or otherwise providing for monetary damages to be recovered for a breach. Indeed, the legislative history indicates that Congress and the Executive Branch believed the Agreement was enforceable only in the forum of international opinion. *Joint Resolution Authorizing the President to Approve the Trusteeship Agreement for the Territory of the Pacific Islands: Hearing on S.J. Res. 143 Before the Senate Comm. on Foreign Relations*, 80th Cong., 1st Sess. 22 (1947) (colloquy between Senator Hickenlooper and Benjamin Gerig, Chief, Division of Dependent Affairs, Department of State) (noting that authority could not in any degrees be overruled in any circumstances, the possibility of "some criticism" if United States did not spend enough, and agreeing with proposition that "if we do not do what we should do, we would subject ourselves to the same criticism any other nation would incur if they did not carry out their obligations – no more, no less."). Similarly and relatively early in the trusteeship the court in *Pauling v. McElroy*, 164 F. Supp. 390, 393 (D.D.C. 1958), *aff'd on other grounds*, 278 F.2d 252 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 835 (1960), found that the Trusteeship Agreement, the United Nations Charter and the principle of freedom of the seas, were "not self-executing and do not vest any of the plaintiffs with individual legal rights which they may assert in this Court."

Plaintiffs proffer a broad but inaccurate – and understandably unsupported – proposition that since the Trusteeship Agreement and the Trust Territory Code were drafted by Americans in the context of American law they should *eo ipso* afford monetary relief for violations. This is a strange proposition in light of such cases as *United States v. Testan*, 424 U.S. 392, 401 (1976) (not "all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation.").

Adducing President Truman's statement of the United States' intent to carry out its obligation under the Trusteeship Agreement, Pet. at 27, Plaintiffs essentially and paradoxically urge a right of monetary damages against the trusteeship funds appropriated by the United States Congress for governmental operations, services, programs, and projects in the Trust Territory. *See* Secretarial Order 3039, § 3.a.1 (funds administered by High Commissioner in accordance with appropriations). An intent to carry out the Trusteeship Agreement's obligations is not the same thing as providing for private damages remedies for breaches of those obligations, and, as the Ninth Circuit determined, there was no intent to create a right to monetary damages. Pet. App. 16.

The Ninth Circuit's determination that the Trust Territory Bill of Rights equal protection component did not give rise to monetary damages, Pet. App. 17, is consistent with the operation of the analogous, *see Di Stefano v. Di Stefano*, 6 T.T.R. 312 (H.Ct. 1973) (Trust Territory Bill of Rights interpreted similarly to analogous provisions of the United States Bill of Rights), equal protection and due

process components of the Fifth Amendment to the United States Constitution. *See Alabama Hospital Association v. United States*, 228 Ct. Cl. 176, 180, 656 F.2d 606, 609 (1981), *cert. denied*, 456 U.S. 943 (1982); *Rogers v. United States*, 14 Cl. Ct. 39, 49-50 (Cl. Ct. 1987) (and cases cited), *aff'd*, 861 F.2d 729 (Fed. Cir. 1988) (Table-unpublished), *cert. denied*, 109 S.Ct. 1930 (1989).

CONCLUSION

For the foregoing reasons Plaintiffs' Petition for Writ of Certiorari should be denied.

DATED this 4th day of April, 1990.

/s/ Traylor T. Mercer
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CONCLUSION

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DATED this 4th day of April, 1990.

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